No. 80572-5

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

RESPONSE TO *AMICUS CURIAE* BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

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I. INTRODUCTION

Amicus, The American Legislative Exchange Council (ALEC), incorrectly argues that it was error for the Washington Court of Appeals in *Schnall v. AT&T Wireless Services, Inc.*, 139 Wn. App. 280, 161 P.3d 395 (2007), to conclude that the Washington Consumer Protection Act applies to a nationwide class. However, instead of analyzing whether the Trial Court and Appellate Court's choice of law analysis in *Schnall* was proper, ALEC incorrectly argues issues of statutory construction, due process and federalism. ALEC does not cite a single case that holds that it is improper for a forum state to apply its state laws to a corporation headquartered in its state where the deceptive acts originated from that state. All of the cases cited by ALEC involve situations where the defendant is headquartered outside the forum state. ALEC points to no facts in the record and makes no argument in their brief that the trial court erred in its choice of law analysis finding that Washington law applies to the nationwide class.

II. STATEMENT OF CASE

Respondents adopt the Statement of the Case from Respondents' Original Brief and Supplemental Brief filed herein. Respondents further point out that the trial court in its memorandum opinion found that Washington law applied to a nationwide class on the Respondents' Consumer Protection Act claims. CP 417 *et seq.* The trial court reached its opinion that Washington had the most significant contacts based on its analysis of Washington's choice of law rules and based on the facts submitted in the record in this case. These facts include that all marketing materials and service agreements originated in Washington and all actions regarding the deceptive practices at issue were made at the direction of Washington management and employees. All of the billing and disclosure decisions were made by AT&T Wireless Services, Inc. (AT&T) management and employees in Washington. All relevant evidence and witnesses are in Washington. Washington has a strong interest in regulating the activities of Washington

businesses. And most importantly, as a Washington business, AT&T is subject to Washington law. CP 417 *et seq.*

III. ARGUMENT

A. The Trial Court's and Appellate Court's Choice of Law Analysis in Schnall Were Correct.

Both the trial court and appellate court correctly analyzed the choice of law issue in *Schnall* by applying the Restatement of Conflicts and finding that Washington had the most significant contacts based on the record in this case. Appellate review of a trial court's findings of fact and conclusions of law for abuse of discretion is limited to determining whether the trial court's findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. *Willener v. Sweeting,* 107 Wn.2d 388, 393, 730 P.2d 45 (1986). *Scott v. Trans-System,* 148 Wn.2d 701, 707-708 (Wash. 2003).

ALEC cites to no facts in the record and offers no analysis of the Restatement of Conflicts as to how the trial court abused its discretion in finding that Washington had the

most significant contacts. As discussed below, the trial court did not abuse its discretion.

1. Conflict/Choice of Law Analysis.

The first step in deciding whether a forum state's substantive law applies to a nationwide class action is whether it is constitutional. *Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008). A forum state's substantive law may apply constitutionally in a class action if the forum state has "a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). The Constitution places only "modest restrictions" on application of a forum's law. *Id.* at 818. "[I]n order to ensure that the choice of . . . law is not arbitrary or unfair," there must be sufficient contacts supporting the state's interest in applying its law. *Id.* at 821-22.

In the instant matter, Washington has substantial contacts to the Respondents' claims. AT&T Wireless Services, Inc. created and carried on its deceptive and unfair marketing

practices in Washington. CP 417 *et seq.*. Defendant conducted business and had its principal headquarters in Washington during the class period. One of the named Plaintiffs is a Washington resident. Defendant's contacts to Washington are significant and not merely "casually or slightly related to the action." *Id.* at 819. Although the injury to Respondents and the potential class members may have occurred outside of Washington, application of Washington law is not arbitrary, unfair, or unforeseeable. *See id.* at 818-19.Therefore, application of Washington law does not violate the Constitution.

The next step is to determine what law applies to the case. Washington employs a two-step approach to choice of law questions. The Court must first determine whether an actual conflict between Washington and other applicable state laws exists. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103-04, 864 P.2d 937 (1994). In the absence of a conflict, Washington law applies. *See Burnside,* 123 Wn.2d at 103-04. If an actual conflict exists, the Court must determine the forum

that has the "most significant relationship" to the action to determine the applicable law. *See Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976) (holding that Washington applies the "most significant relationship" test).

Defendant argued to the trial court that some state consumer protection laws differ from Washington's and that a conflict exists. However, a court need not examine the law of all jurisdictions so long as actual conflict exists between Washington law and the law of one other concerned state. *See Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007). If actual conflict exists, Washington law requires application of the law of the forum that has the "most significant relationship" to the action. *See Johnson*, 87 Wn.2d at 580.

The Second Restatement of Law on Conflict of Laws (1971) §§ 145 (tort) and 148 (misrepresentation) apply to this case. Consideration of both sections is appropriate, but the outcome is the same.

Restatement section 145 requires examining:

a) the place where the injury occurred,
b) the place where the conduct causing the injury occurred,
c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
d) the place where the relationship, if any, between parties is centered.

Restatement § 145(2); Johnson, 87 Wn.2d at 580-81.

Section 148 requires an examination of:

a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
b) the place where the plaintiff received the representations,
c) the place where the defendant made the representations,
d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

The place of injury is of lower importance in a case of deceptive trade practices or misrepresentation. *Id.* The Restatement suggests that "when the place of injury can be said to be fortuitous . . . as in the case of fraud and misrepresentation . . . there may be little reason in logic or persuasiveness to say that one state rather than another is the

place of injury . . . ." Restatement § 145 cmt. e. In such a case, the state in which the fraudulent conduct arises has a stronger relationship to the action. *Id.* Where the defendant's conduct causes harm in two or more states, the "place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law." *Id.* Here, the Defendant's allegedly unfair or deceptive acts caused injury throughout the country. The location of the harm suffered is fortuitous. See *id.*, and *Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (2008).

Based on the trial court's application of the Restatement, the trial court held that "[T]he most significant contacts for the CPA claims are in Washington. All of the marketing materials and service agreements originated in Washington at the direction of Washington employees. All of the billing and disclosure decisions were made by AWS' employees in Washington. All of the relevant documents and most of the witnesses are here. Washington has a strong

interest in regulating any behavior by Washington businesses which contravenes the CPA. "

ALEC has provided no evidence that the trial court's findings are not supported by substantial evidence in the record. And, ALEC has provided no arguments that the trial courts finding of facts do not support the trial courts conclusions of law. Therefore, the trial court did not abuse its discretion in holding that Washington choice of law rules apply, that the most significant contacts occurred in the state of Washington and that the Washington CPA applies to the nationwide class.

B. ALEC Claim That the Washington CPA does not Express a Clear Intent of Extraterritorial Application is Wrong.

ALEC blindly argues that "[T]he express terms of the WCPA do **not** contain a clear expression of intent to apply extraterritorially." Brief p.5. ALEC ignores the clear language of Rev. Code Wash. (RCW) § 19.86.920 which states that: "determination of the relevant market or effective area of competition **shall not be limited by the boundaries of the**

state of Washington." [1] Since ALEC cites no case law limiting Washington's CPA extraterritorially, it can only be presumed that it did not know that RCW § 19.86.920 exists. Further, ALEC legal theory of "extraterritoriality" almost certainly does not even apply to this case. As the U.S. Supreme Court explained in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), the presumption against extraterritoriality serves to prevent clashes between the laws of the United States and other nations. There is no potential in this case for a "clash" between Washington CPA law and that of any other nation.

Next, ALEC cites two out-of-state cases that it claims are "particularly insightful". Brief at p.6. The first case, *Norwest Mortgage, Inc. v. Superior Court,* 72 Cal. App. 4th 214, 85 Cal.

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[1] "The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, **determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington.** To this end this act shall be liberally construed that its beneficial purposes may be served." Rev. Code Wash. (RCW) § 19.86.920.

Rptr. 2d 18, (1999) held that California UCL law applied to California residents but that the "UCL was not intended to regulate conduct unconnected to California." Id at 222. ALEC fails to mention that the corporate defendant in *Norwest* was headquartered in Minnesota and that the deceptive acts complained of originated from Minnesota. ALEC also neglects to mention *Diamond Multimedia Sys. v. Superior Court,* 19 Cal. 4th 1036 (1999),(which was cited by *Norwest*), which applied a California statute to out of state purchasers because: "the conduct which gives rise to liability under section 25400 occurs in California".

The second case cited by ALEC as "insightful" is *Consumer Protection v. Outdoor World* 91 Md.App. 275, 603 A.2d 1376 (1992). This case, like *Norwest* is off point because it involved an out of state defendant. The out of state defendant was charged in Maryland with unfair and deceptive sales practices: sending misleading solicitations into Maryland to induce Maryland residents to travel to campgrounds outside of Maryland. The Maryland court upheld the injunction against

sending into Maryland misleading solicitations, it struck down an injunction prohibiting activities conducted beyond the borders of Maryland.

ALEC also cite the case of *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671; 50 Tex. Sup. J. 21; (2006), but like *Norwest* and *Outdoor*, it involved an out of state defendant, Coca-Cola Co., (Georgia) and plaintiffs who were bottlers from other states, (some of whom had no contact with Texas), who were suing under the Texas antitrust act.

C. Due Process does not Preclude a Nationwide Class.

As pointed out above, a forum state's substantive law may apply constitutionally in a class action if the forum state has "a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). The Constitution places only "modest restrictions" on application of a forum's law. *Id.* at 818.

In the instant matter, Washington has substantial contacts to the Respondents' claims. AT&T Wireless Services, Inc. created and carried on its deceptive and unfair marketing practices in Washington. Defendant conducted business and had its principal headquarters in Washington during the class period. One of the named plaintiffs is a Washington resident. Defendant's contacts to Washington are significant and not merely "casually or slightly related to the action." *Id.* at 819. Although the injury to Respondents and the potential class members may have occurred outside of Washington, application of Washington law is not arbitrary, unfair, or unforeseeable. *See id.* at 818-19.Therefore, application of Washington law does not violate the Constitution.

D. Federalism and State Sovereignty do not Preclude Application of CPA to All Class Members.

ALEC federalism and state sovereignty arguments rest on the principal that it is overreaching for one state to impose its laws on other states. These arguments ignore choice of law principals and the fact that Washington like all other states have a strong interest in regulating the activities of businesses

within their state. Washington is not arbitrarily imposing its CPA laws on sister states, but rather is applying its choice of law rules and regulating business conduct originating from Washington.

In order to determine what law applies to these consumer protection claims the trial court did a conflict of law analysis to determine what state had the most significant contact. *See Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976) (holding that Washington applies the "most significant relationship" test). Here, the trial court found that the most significant relationships were in Washington because all of the marketing materials and service agreements originated in Washington at the direction of Washington employees. All of the billing and disclosure decisions were made by AT&T employees in Washington. All relevant evidence and witnesses are in Washington. Washington has a strong interest in regulating the activities of Washington businesses. And most importantly, as a Washington business, AT&T is subject to Washington law. CP

417 *et seq.* These are significant factors which the trial court correctly applied to conclude that the Washington CPA applies to all of the appellants' CPA claims. *Schnall,* 139 Wn. App. 280, 294 (2007). Simply put, there are no sovereignty or federalisms issues that preclude applying Washington CPA law to all class members.

IV. CONCLUSION

For the foregoing reasons Respondents urge the court to uphold the ruling of the Court of Appeals.

DATED this 20th day of October, 2008.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day, October 20, 2008 she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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